IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	Case No. 1108002781
	)	
DEBRA MULHOLLAND,	)	
	)	
Defendant.	)	

Submitted: May 10, 2013
Decided: June 14, 2013

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MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION SUPPRESS

Defendant Debra Mulholland was arrested and charged on January 22, 2012 with the offense of Driving Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a)(1) and Failure to Remain Within a Single Lane in violation of 21 *Del. C.* § 4122(1). Defendant filed this motion to suppress evidence alleging lack of reasonable articulable suspicion for the traffic stop and lack of probable cause for the subsequent DUI arrest. The Court held a suppression hearing on April 16, 2013, and reserved decision pending further briefing. After a review of the record evidence, applicable law, and arguments submitted by the parties, the Court **GRANTS** Defendant's motion to suppress.

FACTS

The State's sole witness at the hearing was Trooper Geoffrey Biddle of the Delaware State Police. The State also introduced a MVR video recording of the traffic stop and arrest.[1] On the night of January 22, 2012, Trooper Biddle was on patrol in the area of Route 13, in New Castle County, State of Delaware.

Trooper Biddle testified that he observed a red SUV cross the right fog line twice and weave within its lane of traffic.[2] The MVR clearly showed Defendant's vehicle travel over the line. Upon this observation, he activated his emergency lights and stopped the SUV.

Trooper Biddle identified Defendant Debra Mulholland as the driver of the SUV he pulled over on Route 13. Defendant pulled over immediately after the Officer activated his overhead lights. Trooper Biddle testified that, at the time of the stop, it was close to midnight and the weather was cold, but there was no snow on the ground. The MVR showed that there was snow on the ground.

After approaching Defendant, Trooper Biddle inquired whether she had been drinking. Defendant stated she drank wine earlier in the day at a funeral, but she had waited a while to leave to ensure she was capable of driving. Defendant further stated that her vehicle was having gear trouble, and she had previously stopped three or four times on the way home. Defendant did not have her driver's license in her possession. Upon request by Trooper Biddle, Defendant correctly stated the alphabet, letters D through P.

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[1] State Ex. 1. Trooper Biddle's police vehicle has a MVR video recorder that is activated upon the signaling of the emergency lights. Once the video is recorded, it is uploaded from the digital recorder to a server kept at the Police Troop.

[2] Trooper Biddle testified in the direct examination that the vehicle crossed the line twice. On cross examination, Trooper Biddle stated that the vehicle crossed the line once, maybe more.

Trooper Biddle testified that he was approximately two feet away from Defendant while Defendant was seated in driver seat of her vehicle. He observed that Defendant had bloodshot eyes and he could smell a strong odor of alcohol. Defendant did not have slurred speech and exited the vehicle with no difficulty. Trooper Biddle decided to administer National Highway Traffic and Safety Administration ("NHTSA") field sobriety tests. Trooper Biddle completed police training in NHTSA-DUI Detection and Horizontal Gaze Nystagmus ("HGN") Certification.[3] Trooper Biddle conceded on cross examination that his training in NHTSA field sobriety tests did not include conducting the tests in freezing cold conditions.

The first field test administered was the HGN, which was recorded on the MVR. Defendant's head was moving from side to side while following Trooper Biddle's pen. Trooper Biddle then instructed Defendant to keep her head still; Trooper Biddle testified that he observed Defendant's eyes were jerking and observed six clues total, three in each eye. Trooper Biddle admitted on cross examination that head movement during the HGN test could affect the accuracy of the results. There were a couple of seconds where Defendant completed the test without any head movement on the MVR footage. Trooper Biddle did not as indicated in the NHTSA instructions, ask Defendant whether she was wearing contacts or whether she had any physical conditions that would affect the test.

The second field test administered was the walk-and-turn test. Trooper Biddle asked Defendant if she had any difficulty walking and she replied no. When Trooper Biddle was giving instructions, the Defendant began to take steps. Trooper Biddle testified he had not

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[3] State Ex. 2.

told Defendant to refrain from beginning the test until she was instructed to start. The Defendant immediately complied with instructions to stop and began the test promptly upon re-instruction. Defendant kept her hands at her sides and walked nine steps forward, turned, and took nine steps back. The MVR footage did not show whether she missed any steps heel-to-toe. Trooper Biddle testified that he observed two clues because Defendant missed one heel toe and began before instructed to start.

The third and final test was the one-leg stand. Trooper Biddle's instructions to Defendant were to raise her leg off of the ground and he demonstrated while counting to four. He then asked Defendant if she understood the test. He repeated his demonstration by counting to three, and then he told Defendant at the end of the instruction, in a low voice, that she was to hold the leg up for a count to thirty. Defendant was unable to complete the test. Trooper Biddle testified that Defendant kept putting her foot down, swayed, and did not complete the test. The MVR shows that Defendant kept putting her foot down, and twice stated, "I can't stand on one foot."

Trooper Biddle began administering the first test at approximately 12:09 a.m., and the third test was completed at 12:12 a.m. Therefore, all three field tests took approximately three and a half minutes to complete, including instructions. Trooper Biddle testified that after the completion of the three field tests, it was his opinion that Defendant was under the influence of alcohol. Defendant was then arrested for suspicion of DUI and taken to the police station.

PARTIES' CONTENTIONS

First, Defendant argues that there was a discovery violation by the State because the State's discovery request identified Trooper Radcliff as the expert and qualified witness pertaining to this case, not the actual arresting officer, Trooper Biddle. At the hearing, the Court held that there was no discovery violation by the State because the testifying witness is the arresting officer who is also employed by the State Police as is Trooper Radcliff. In post-hearing briefing, the Defendant asserts that Court of Common Pleas Criminal Rule 16(a)(E) requires the State to provide the identity of the any expert; therefore, Defendant moves the Court to reconsider this ruling.

Second, Defendant argues that Trooper Biddle lacked reasonable articulable suspicion under 21 *Del. C.* § 4122 to stop his vehicle. Defendant argues that in order to have reasonable articulable suspicion, the vehicle has to move outside of the lanes of traffic, and the move must have been done in an unsafe manner.[4] The State response in opposition is that by crossing the fog line, the officer had reasonable suspicion to stop Defendant. In the alternative, the State argues that Defendant's vehicle swerving within the lane rises to the very low standard of reasonable articulable suspicion which would support a basis for the stop.

Lastly, Defendant contends that Trooper Biddle lacked probable cause to arrest for DUI, and as a result, the evidence gathered must be suppressed. The State opposes the motion and argues that there was probable cause for the DUI arrest.

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[4] *State v. Atkins*, 2007 WL 1861903 (Del. Super. June 26, 2007).

DISCUSSION

I. No Discovery Violation

The Court previously ruled on April 16, 2013, that the alleged error in the discovery response letter, indicating the incorrect officer's name, was not a discovery violation. The correct officer's name, Trooper Biddle, was provided in the police report and other discovery materials. At the hearing, the Court found that Defendant suffered no prejudice from this typographic error. Since this issue has been decided, I find no basis to revisit the additional arguments regarding discovery.

II. Reasonable Articulable Suspicion Existed

When a person is detained by a traffic stop, a seizure occurs under the Fourth Amendment and the stop "is subject to constitutional limitations."[5] The burden is on the State to show that the stop was reasonable under the circumstances.[6] The officer conducting the traffic stop must have reasonable articulable suspicion that a crime has occurred, is occurring, or is about to occur.[7] A determination of reasonable articulable suspicion is "both somewhat abstract and fact specific," turning on the particular circumstances of each case.[8]

The issue is whether Trooper Biddle had reasonable articulable suspicion to stop defendant on the night of the arrest. Defendant relies on *State v. Adkins* for the proposition

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[5] *State v. Lanouette*, 2012 WL 4857820, at *7 (Del. Com. Pl. Aug. 27, 2012) (citing *Whren v. United States*, 517 U.S. 806, 809 (1996)).

[6] *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

[7] *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

[8] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1288 (Del. 2008) (quoting *Terry v. Ohio*, 392 U.S. 1, 29 (1968)).

that, in order to have reasonable articulable suspicion, the vehicle must travel outside of the traffic lines in an unsafe manner. However, Defendant's reliance on *Adkins* is misplaced. *Adkins* deals with the statutory construction of 21 *Del. C.* § 4176A, Operation of a Vehicle Causing Death–not reasonable articulable suspicion.[9] The Superior Court held that the statute was unconstitutional because the state of mind sufficient to establish the offense was not prescribed by the statute.[10] The Court fails to find support for this argument in the analysis advanced by Defendant.

The facts need only provide a basis for the Court to determine whether the State has shown that the stop was reasonable under the circumstances. Trooper Biddle testified that he observed Defendant's vehicle cross over the right fog line. Additionally, the MVR clearly showed Defendant's red SUV cross over the line prior to the traffic stop. Accordingly, I find that Trooper Biddle had reasonable articulable suspicion to conduct the traffic stop.

III. Probable Cause

Once a defendant moves to suppress evidence, the State bears the burden to establish probable cause by a preponderance of the evidence.[11] The trial court must consider the totality of the circumstances to determine whether the officer's knowledge, at the time of the arrest, was sufficient to warrant a person of reasonable caution to believe that criminal activity has been or is presently being committed.[12] "[P]robable cause is an elusive concept

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[9] *State v. Atkins*, 2007 WL 1861903 (Del. Super. June 26, 2007).

[10] *Id.* at 9.

[11] *Bease v. State*, 884 A.2d 495, 498 (Del. 2005).

[12] *Id.* (citing *State v. Maxwell*, 624 A.2d 926, 928 (Del. 1993)).

which avoids precise definition . . . It lies somewhere between suspicion and sufficient evidence to convict."[13]

In driving under the influence ("DUI") cases brought pursuant to 21 *Del. C.* § 4177, the arresting officer must be able to point to facts which support a finding of probable cause to believe that the defendant drove the vehicle while impaired.[14] "Under the influence" means that "the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle." To establish probable cause, the police are only required to present facts which suggest that there is a fair probability that the defendant committed the offense. When this inquiry involves a defendant in an arrest for driving under the influence of alcohol, such is determined by the totality of the circumstances, as viewed by a reasonable police officer in the light of his or her training and experience.[15] Further, probable cause to arrest for DUI rests upon the observations of the arresting officer, which includes the driver's performance on field sobriety tests.[16]

A. No probable cause prior to field tests

A traffic violation combined with odor of alcohol does not alone constitute probable cause to arrest for DUI, but may amount to reasonable suspicion of DUI and justify a

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[13] *Maxwell*, 624 A.2d at 929 (citations omitted).

[14] *Lefebvre v. State*, 19 A.3d 287, 292 (Del. 2011).

[15] *Miller v. State*, 4 A.3d. 371 (Del. 2010)

[16] *Lefebvre*, 19 A.3d at 293.

request to perform field tests.[17] In *Bease v. State*, the Delaware Supreme Court held that probable cause existed to administer the intoxilyzer when there was: (1) a traffic violation; (2) a smell of alcohol; (3) rapid speech; (4) admission to drinking; (5) bloodshot and glassy eyes; and (5) a failed alphabet test.[18]

In *Lefebvre v. State*, the Delaware Supreme Court held that where there was probable cause for the DUI arrest and thereafter sufficient performance on the field tests, such does not negate the probable cause that existed prior to the field tests.[19] Lefebvre committed a traffic offense, had a strong odor of alcohol, had a flushed face, was somewhat argumentative with the officer, admitted to drinking an hour and a half prior to the stop, and said that she was not good at the one-leg stand test sober.[20] However, Lefebvre also had fair speech, passed the alphabet, counting, finger dexterity, one-leg stand, and walk-and-turn tests without issue, and exited her car without losing her balance.[21] Notably, Lefebvre conceded, and the Delaware Supreme Court agreed, that probable cause existed prior to the field tests pursuant to *Bease*.[22]

Accordingly, this Court will determine whether the present facts establish probable cause prior to the field tests. The quantum of observations of intoxication provided by

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[17] *Lefebvre*, 19 A.3d at 293-295 (citing *Elam v. Voshell*, 1987 WL 8277, at *2 (Del. Super. Mar. 2, 1987)).

[18] *Bease*, 884 A.2d at 499-500.

[19] *Lefebvre*, 19 A.3d at 295.

[20] *Id.* at 290-291.

[21] *Id.* at 290-292.

[22] *Id.* at 293. Defendant in this case does not concede probable cause existed prior to field testing.

Trooper Biddle prior to the field tests lies between those provided by the officers in *Bease* and *Lefebvre*.

Here, Defendant immediately pulled over and was cooperative during the stop. Although Defendant admitted that she drank wine earlier at a funeral that day, she stated it occurred earlier in the day and she waited to ensure she was able to drive. Trooper Biddle observed Defendant's eyes were bloodshot and there was a strong odor of alcohol. Trooper Biddle testified that Defendant's speech was not slurred, and she had no difficulty exiting the vehicle. The MVR also showed Defendant acting lucidly and cooperatively. Defendant also passed the alphabet test.

The Court finds that probable cause to arrest Defendant for DUI was not established prior to the field tests as it was in *Bease* and *Lefebvre*. What is absent from this case that was present in both *Bease* and *Lefebvre* was unusual speech, plus something more (i.e. being argumentative, having a flushed face, or failing an alphabet test). I do not find in these facts that minor weaving within lanes, odor of alcohol, bloodshot eyes at midnight, and admission to drinking at funeral earlier in the day[23], sufficient to establish that Defendant was driving under the influence when considered with Defendant's coherent appearance, good speech, passing alphabet test, and other actions.

B. No probable cause after field tests

In order to determine if field tests are reliable, the Court must decide if the field tests were administered in accordance with the NHTSA standards.[24] When field tests are not

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[23] Lefebvre admitted to drinking 1.5 hours before driving.

[24] *State v. Ministero*, 2006 WL 3844201, *5 (Del. Super. Dec. 21, 2006).

administered pursuant to NHTSA guidelines, the reliability of such tests are subject to question when determining the existence of probable cause.[25] The Court notes, at the outset of discussion of the field tests, that the instructions and administration of the following three field tests took approximately three and a half minutes–from 12:09 a.m. to 12:12 a.m.

a. HGN Test

The HGN test is a reliable indicator of impairment and may be used in assessing probable cause.[26] "[D]ue to the possibility of misdiagnosis or poor application, in order for a court to admit HGN evidence, a proper foundation must first be laid."[27] A proper foundation entails the State establishing both that the officer was trained to administer the test and that the officer followed proper procedures when administering the test.[28]

Here, Trooper Biddle testified that he was trained to perform the HGN in accordance with NHTSA standards and that he received HGN certification.[29] The issue is whether the test was administered pursuant to NHTSA standards. Trooper Biddle testified that he observed six out of six possible clues when he administered the HGN test to Defendant. The testimony and MVR, however, revealed several failures to observe NHTSA standards in the administration of the HGN test. There is no testimony that instructions were given prior to the test.

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[25] *Id.* at *4.

[26] *State v. Ministero*, 2006 WL 3844201, *5 (Del. Super. Dec. 21, 2006).

[27] *Id.* (citing *Zimmerman v. State*, 693 A.3d 311, 315 (Del. Super. 1997)).

[28] *Id.*

[29] State Ex. 2.

Defendant's head was moving from side to side during the majority of the time of the test. Trooper Biddle conceded that this would affect the reliability of the test, but maintained that after further instruction, Defendant stopped moving her head. The MVR showed Defendant's head still during the test for a mere couple of seconds. According to NHTSA standards, "[i]t is important to use the full four seconds when checking for onset of nystagmus [in each eye]. If you move the stimulus too fast, you may go past the point of onset or miss it altogether."[30]

The facts during the hearing indicate that the test was administered in a rushed manner and the Trooper failed to inquire if Defendant was wearing contacts, and to establish Defendant's physical amenability to the test. The conditions and test administration renders the test results unreliable and I give them no weight.

b. Walk-and-Turn Test

Trooper Biddle testified that he observed six clues because Defendant missed one heel-to-toe and began the test before instructed. The MVR shows that Trooper Biddle never instructed Defendant not to begin the test until he completed the instructions as required by NHTSA standards.[31] He also never inquired whether Defendant understood the instructions, which is also required by NHTSA standards.[32] Therefore, the Court finds that beginning the test too early cannot be considered as a clue. Defendant kept her hands by

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[30] National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Testing*, 2006 Edition, Instructor's Manual Session VIII, (hereinafter "Session VIII") at 7.

[31] NHTSA standards for the walk-and-turn test require the officer to instruct the person prior to the test to "[m]aintain this position until I have completed the instructions. Do not start to walk until told to do so." Session VIII at 9.

[32] The standards then instruct the officer to ask the subject of the test if they understand the instructions so far. Trooper Biddle did not comply with the standards. Session VIII at 9.

her side, completed all nine steps, and only missed lining up one heel-to-toe. The Court finds that Defendant's satisfactorily performed the walk-and-turn test.

c. One-leg Stand Test

The third and final test was the one-leg stand. Trooper Biddle's instructions to Defendant were to raise her leg off of the ground and he demonstrated while counting to four. He then asked Defendant if she understood the test. Trooper Biddle then repeated his demonstration by counting to three, and then he told Defendant at the very end of the instruction to count to thirty.

Trooper Biddle testified that Defendant kept putting her foot down, swayed, and didn't complete the test. The MVR showed that Defendant kept having to put her foot down and twice stated, "I can't stand on one foot." Trooper Biddle never asked Defendant if she was injured or had any reason she was unable to perform the test.

According to NHTSA standards, if an individual performance indicates two or more clues or fails to complete the one-leg stand, there is a good chance the BAC is above 0.10. Based on that criteria, there is 65% probability that the person tested will have a BAC of the people you test as to whether their BAC's are above 0.10."[33] However, if a suspect is unable to do the test, the officer is directed to record the observed clues and document the reason for not completing the test.[34]

d. Conclusion about Field Tests

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[33] Session VIII at 13.

[34] *Id.*

The field test in this case was administered under extremely cold conditions with snow on the roadway. Thus, the Court finds that the results of two field tests are unreliable indicators of intoxication due to the manner in which they were conducted. The HGN test cannot be considered where it was not administered in accordance with NHTSA guidelines. The Defendant performed satisfactorily on the walk-and-turn test absent incorrect instructions. The only poor performance was on the one-leg stand test, which Defendant stated she was unable to complete. Therefore, I find no basis and will not consider the HGN and walk-and-turn test, and consider only the one-leg stand test.

CONCLUSION

In sum, the only evidence of intoxication prior to Defendant's DUI arrest consisted of: a traffic violation, admission to drinking earlier in the day, odor of alcohol, bloodshot eyes at midnight, and inability to complete the one-leg stand test. Under the totality of the circumstances, I do not find this sufficient to establish that there was a fair probability that Defendant was driving under the influence. Therefore, the State has failed to prove probable cause by a preponderance of the evidence.

Accordingly, **IT IS HEREBY ORDERED this 14th day of June, 2013** that Defendant's motion to suppress the field sobriety tests is **GRANTED**.

The Honorable Alex J. Smalls.
Chief Judge